States Department of Labor pursuant to statutory authority, or pursuant to executive order.

§ 18.1102 [Reserved]

§ 18.1103 Title.

These rules may be known as the United States Department of Labor Rules of Evidence and cited as 29 CFR 18.____ (1989).

§ 18.1104 Effective date.

These rules are effective thirty days after date of publication with respect to formal adversarial adjudications as specified in §18.1101 except that with respect to hearings held following an investigation conducted by the United States Department of Labor, these rules shall be effective only where the investigation commenced thirty days after publication.

APPENDIX TO SUBPART B OF PART 18—REPORTER'S NOTES

Reporter's Introductory Note

The Rules of Evidence for the United States Department of Labor modify the Federal Rules of Evidence for application in formal adversarial adjudications conducted by the United States Department of Labor. The civil nonjury nature of the hearings and the broad underlying values and goals of the administrative process are given recognition in these rules.

REPORTER'S NOTE TO §18.102

In all formal adversarial adjudications of the United States Department of Labor governed by these rules, and in particular such adjudications in which a party appears without the benefit of counsel, the judge is required to construe these rules and to exercise discretion as provided in the rules, see, e.g., §18.403, to secure fairness in administration and elimination of unjustifiable expense and delay to the end that the truth may be ascertained and the proceedings justly determined, §18.102. The judge shall also exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment, §18.611(a).

REPORTER'S NOTE TO §18.103

Section 18.103(a) provides that error is not harmless, i.e., a substantial right is affected, unless on review it is determined that it is more probably true than not true that the error did not materially contribute to the decision or order of the court. The more probably true than not true test is the most liberal harmless error standard. See *Haddad* v. *Lockheed California Corp.*, 720 F.2d 1454, 1458–59 (9th Cir. 1983):

The purpose of a harmless error standard is to enable an appellate court to gauge the probability that the trier of fact was affected by the error. See R. Traynor, [The Riddle of Harmless Error] at 29–30. Perhaps the most important factor to consider in fashioning such a standard is the nature of the particular fact-finding process to which the standard is to be applied. Accordingly, a crucial first step in determining how we should gauge the probability that an error was harmless is recognizing the distinction between civil and criminal trials. See *Kotteakos* v. *United States*, 328 U.S. 750, 763, 66 S.Ct. 1239, 1247, 90 L.Ed. 1557 (1946); *Valle-Valdez*, 544 F.2d at 914–15. This distinction has two facets, each of which reflects the differing burdens of proof in civil and criminal cases. First, the lower burden of proof in civil cases implies a larger margin of error. The danger of the harmless error doctrine is that an appellate court may usurp the jury's function, by merely deleting improper evidence from the record and assessing the sufficiency of the evidence to support the verdict below. See *Kotteakos*, 328 U.S. at 764–65, 66 S.Ct. at 1247–48; R. Traynor, *supra*, at 18–22. This danger has less practical importance where, as in most civil cases, the jury verdict merely rests on a more probable than not standard of proof.

The second facet of the distinction between errors in civil and criminal trials involves the differing degrees of certainty owed to civil and criminal litigants. Whereas a criminal defendant must be found guilty beyond a reasonable doubt, a civil litigant merely has a right to a jury verdict that more probably than not corresponds to the truth.

The term *materially contribute* was chosen as the most appropriate in preference to *substantially swayed*, *Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946) or *material effect*. *Holloway* v. *Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The word *contribute* was employed in *Schneble* v. *Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) and *United States* v. *Hastings*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

Error will not be considered in determining whether a substantial right of a party was affected if the evidence was admitted in error following a properly made objection, §18.103(a)(1), and the judge explicitly states that he or she does not rely on such evidence in support of the decision or order. The judge must explicitly decline to rely upon the improperly admitted evidence. The alternative